IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

CATHY JO WILSON,

Plaintiff-Appellant,

vs.

NEBRASKA DEPARTMENT OF MOTOR VEHICLES,

Defendant-Appellee.

Case No. CI02-26

JUDGMENT ON APPEAL

DATE OF HEARING: September 27, 2002.

DATE OF RENDITION: September 29, 2002.

DATE OF ENTRY: Court clerk's file-stamp date per § 25-1301(3).

APPEARANCES:

For plaintiff-appellant: Rodney J. Palmer without plaintiff-appellant.

For defendant-appellee: David M. Streich, Brown County Attorney, on behalf of Nebraska Attorney General.

SUBJECT OF JUDGMENT: Decision on the merits on petition for review under Administrative Procedure Act.

FINDINGS: The court finds and concludes that:

1. This court determines the action after de novo review upon the record of the agency. As the Nebraska Court of Appeals has restated, proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Chrysler Corp. v. Lee Janssen Motor Co.*, 9 Neb. App. 721, 619 N.W.2d 78 (2000). However, where the evidence is in conflict, the district court, in applying a de novo standard of review, can consider and may give weight to the fact that the agency hearing examiner observed the witnesses and accepted one version of the facts rather than another. *Law Offices of Ronald J. Palagi v.*

Dolan, 251 Neb. 457, 558 N.W.2d 303 (1997). In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals. *Chrysler Corp. v. Lee Janssen Motor Co.*, *supra*.

2. The court has considered all of the claims asserted in the petition for review. However, the court does not discuss in detail those issues clearly lacking any legal merit. The matters asserted in paragraphs 5, 11, and 12 of the petition for review are identical to those considered in *Gillespie v. Nebraska Dep't of Motor Vehicle*, 2001-036 (Neb. Dist. Ct., 8th Dist., 2001), which decided those issues adversely to the appellant's contentions. The explanations set forth in *Gillespie* need not be repeated here.

3. The principal arguments advanced by the appellant for reversal appear in paragraphs 13A through 13D, which assert three claimed errors. Paragraph 13A asserts that the evidence proved one of the factual statements of the sworn report, specifically, the chemical test result, to be false, and met appellant's burden to defeat the department's prima facie case.

4. The hearing record shows that two preliminary breath tests were administered with significantly different results although both were above the legal limit. The officer arrested the appellant and transported her to the sheriff's office where a chemical breath test was administered. The officer completed the sworn report, but filled in one of the preliminary test numbers rather than the actual chemical test result on the sworn report. The sworn report was not corrected or amended at any time prior to the commencement of the hearing. At the hearing, during the department's initial examination, the examination disclosed the discrepancy. The hearing officer nonetheless received the sworn report and considered the sworn report to have been "corrected by the [officer's] undisputed testimony . . . ." T9.

5. Section 60-6,205(7) places the burden of proof in this proceeding on the appellant. "Upon receipt of the arresting peace officer's sworn report, the director's order of revocation has prima facie validity and it becomes the petitioner's burden to establish

by a preponderance of the evidence grounds upon which the operator's license revocation should not take effect." NEB. REV. STAT. § 60-6,205(7) (Supp. 2001).

6. The Nebraska Supreme Court has repeatedly stated that the department makes a prima facie case once it establishes that the arresting officer provided his or her sworn report to the director containing the required recitations. *Davis v. Wimes*, 263 Neb. 504, ___ N.W.2d ___ (2002); *McGuire v. Department of Motor Vehicles*, 253 Neb. 92, 568 N.W.2d 471 (1997); *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). Thereafter, the burden is on the appellant to prove that one or more of the recitations on the sworn report were false. *Id*. Clearly, the officer admitted that the test result entered on the sworn report was not the actual result. 25:5-6. Thus, the appellant met the literal requirement of *McPherrin*, *McGuire*, and *Davis* to prove that a recitation on the sworn report was false.

7. The department seeks to overcome this problem in two ways. First, the department urges that the officer's testimony at the hearing "amended" or "corrected" the sworn report. This argument collapses upon the obvious collision with the constitutional requirement of due process. In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). The sworn report asserts a specific factual basis, namely, a chemical test result of 0.212 grams of alcohol per 210 liters of breath. The test result constitutes the core fact of the accusation, not some collateral detail. The concept of due process embodies the notion of fundamental fairness. *Id*. Allowing "amendment" or "correction" of the test result after commencement of the hearing deprives the appellant of due process in the same way as would a refusal by the accuser to disclose the result. The record in this case clearly shows that no attempt was made to "amend" or "correct" the sworn report, or to provide

notice of the amendment or correction to the appellant, prior to the hearing. This court should not and does not speculate whether alternative procedures might change the result.

8. Second, the department asserts that the only recitation required concerning the test result is a general recitation that "the test revealed the presence of alcohol in a concentration specified in section 60-6,196." NEB. REV. STAT. § 60-6,205(3) (Supp. 2001). The department effectively argues that the specific test result is not a required statement in the sworn report. This court believes that the department's construction cannot withstand constitutional due process scrutiny. When a statute is susceptible of two constructions, under one of which the statute is valid while under the other of which the statute would be unconstitutional or of doubtful validity, that construction which results in validity is to be adopted. *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002).

9. Moreover, even if the failure to specify the test result in the sworn report passes constitutional muster, this court concludes it cannot withstand the analysis employed by the Nebraska Supreme Court in *McGuire*. There, the court stated: "In order for a motorist to be validly arrested . . . , [the arresting officer] must first demonstrate a concentration of alcohol in [the motorist's] blood in excess of the statutory limit." *McGuire*, *supra* at 95, 568 N.W.2d at ___. The hearing officer overruled the appellant's foundation objection to the actual test result. 26:1-16. The arresting officer testified that he followed a checklist. But he was not asked and did not testify that the checklist constituted a method approved by the Department of Health and Human Services Regulation and Licensure. He thereby failed to testify the test was "performed according to methods approved by the Department of Health and Human Services Regulation and Licensure . . . ." NEB. REV. STAT. § 60-6,201(3) (Supp. 2001). The foundation objection should have been sustained. The hearing officer erred in receiving the test result. Under the *McGuire* analysis, the foundational questions failed to adduce the basis for admission of the test result and thereby failed to establish the actual test result, which constitutes a prerequisite of a valid arrest.

10. Although the department did not assert that any regulation directly affected this case, the court has considered the most recent regulations adopted by the department which became effective on September 10, 2001. Title 247, Chapter 1, Nebraska Administrative Code. This court finds no regulation providing additional guidance to the statutory language on the issues presented in this case.

11. The decision of the director must be reversed and dismissed.

12. This court need not address the other two issues asserted in paragraph 13 of the petition for review. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court need not address issue not necessary to decision).

JUDGMENT: IT IS THEREFORE ADJUDGED that:

1. The Order of Revocation rendered against the appellant on July 10, 2002, is reversed and the cause remanded to the director with direction to dismiss the proceeding.

2. Costs on appeal in the amount of $147.97 are taxed to the appellee, and judgment is entered in favor of the appellant and against the appellee for such costs. The judgment shall bear interest at the rate of 3.770% per annum from date of entry of judgment until paid.

3. Any request for attorney fees, express or implied, is denied.

Signed in chambers at **Ainsworth**, Nebraska, on **September 29, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.
If checked, the court clerk shall:

[X] Mail a copy of this order to all counsel of record and any pro se parties**, including to both the Brown County Attorney and the Nebraska Attorney General for defendant**.
Done on _____, 20_____ by _____.

[X] Note the decision on the trial docket as: [date of filing] **Signed "Judgment on Appeal" entered**.
Done on _____, 20_____ by _____.

[X] Mail postcard/notice required by § 25-1301.01 within 3 days. (Order of revocation reversed and remanded with directions to dismiss; costs taxed to defendant-appellee)
Done on _____, 20_____ by _____.

[X] Enter judgment on the judgment record.
Done on _____, 20_____ by _____.

Mailed to:

BY THE COURT:

_____
William B. Cassel, District Judge